United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7043

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

ELLIS-BARKER SILVER CO., INC.,

Plaintiff-Appellant,

against

RIDGWAY POTTERIES LIMITED,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF OF DEFENDANT-APPELLEE

CRAVATH, SWAINE & MOORE,
Attorneys for Defendant-Appellee,
One Chase Manhattan Plaza,
New York, New York 10005
212-422-3000

JOHN R. HUPPER,
W. FILLMORE WOOD, JR.,

Of Counsel.

April 30, 1975

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PRELIMINARY STATEMENT

Plaintiff appeals from a judgment of the Southern District of New York (Pollack, J.) dismissing this action "upon the ground of the existence of an enforceable forum stipulation and the further ground of forum non conveniens". (A. 52)

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court properly exercise its discretion in dismissing this action upon the ground of the existence of an enforceable forum stipulation?

A. Did the District Court properly hold that the parties' contract contains a forum stipulation applicable to plaintiff's claim where the parties' contract provides that in the case of "any dispute or difference . . . regarding anything done or omitted by either party in relation to this Agreement . . . [plaintiff] will submit to the Supreme Court of Judicature in England as the sole competent Tribunal for determining the same"?

B. Did the District Court properly hold that the forum stipulation should be enforced where the contract, which is to be governed by English law, was the product of arm's-length negotiations between businessmen with respect to international commercial transactions, the

operative facts took place outside the United States, and no showing has been made that enforcement will deprive plaintiff of a fair, competent hearing on its claim?

2. Did the District Court properly exercise its discretion in dismissing this action upon the further ground of forum non conveniens where the record demonstrates that English law is to govern, the contract provides that litigation be brought in England, the operative facts all occurred in the United Kingdom and the significant evidence and witnesses, including witnesses not subject to process here, are in the United Kingdom?

COUNTERSTATEMENT OF THE CASE

This is an action for an accounting as to amounts allegedly due under commission agreements between plaintiff and defendant. These agreements extend only to certain specified types of sales of certain specified products of defendant. It is defendant's position that the sales in question, which were arranged, and took place, outside the United States, are not within the scope of the agreements under which plaintiff allegedly claims.

COUNTERSTATEMENT OF PROCEEDINGS BELOW

This action was originally instituted in the New York Supreme Court, New York County, and was removed to this Court pursuant to 28 U.S.C. 1441 (1970).

The First Cause of Action in the complaint alleges that a commission is due to plaintiff with respect to defendant's sale of a product known as "Black and White Scotties" to a third party. These are dog-shaped Scotch bottles, which were sold by defendant to James Buchanan and Co. Limited ("Buchanan"), of Glasgow, Scotland, a company wholly unaffiliated with defendant. Buchanan filled the bottles with Scotch whiskey and then distributed them. The Second Cause of Action alleges that a commission is also due to plaintiff with respect to defendant's sales outside the United States to third parties of certain products designed by Nan Prussack. She designed baskets, which were rendered in porcelain by defendant.

Prior to any further proceedings, defendant moved to dismiss upon the grounds of (1) lack of personal jurisdiction, (2) the presence of an applicable, enforceable forum stipulation and (3) forum non conveniens. Following briefing and oral argument, the District Court granted the motion on the latter two grounds. Having determined that the action should be dismissed, the Court did not need to decide, and did not decide, whether the personal jurisdiction ground asserted by defendant was an additional meritorious basis for dismissal. Plaintiff appeals from the judgment of dismissal.

COUNTERSTATEMENT OF FACTS

Defendant Ridgway Potteries Limited is an English

corporation engaged in the manufacture and sale of various porcelain products. (A. 18,19)

Plaintiff Ellis-Barker Silver Co. Inc. is a Delaware corporation engaged in the distribution of porcelain products. (A. 3, 22) Plaintiff, or its assignor, for several years prior to January 1974 served as a distributor of certain of defendant's products in the United States pursuant to a written contract (the "Contract"). (A. 24-30)

On or about November 28, 1967, defendant and Exclusive China Co. Inc. ("Exclusive") entered into a written agreement. (A. 24-28)* This agreement, among other things, appointed Exclusive as defendant's agent and distributor in the United States of America explicitly (A. 28) for the sale of only those ornamental bone china products that were manufacured at defendant's Adderley Floral China Factory that was located at Sutherland Road, Longton, Stoke-on-Trent, England--not all Royal Adderley products, as claimed by plaintiff (Br. 3). Neither Royal Adderley tableware, nor any Royal Adderley products produced at other factories, are within the scope of this agreement.

On or about July 30, 1971, defendant, Exclusive and

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* This agreement was amended by a written agreement (A. 29) between defendant and Exclusive on or about November 14, 1969, the terms of which are not relevant to the issues before this Court.

plaintiff entered into a written agreement (A. 30), which agreement further amended the November 28, 1967, agreement by providing that plaintiff, as Exclusive's assignee, was appointed agent and distributor for those products of defendant for which Exclusive had been defendant's agent and distributor, "subject to all the terms and conditions of the said Agreement [of November 28, 1967]".*

Paragraph 18 of the November 28, 1967, agreement, which has not been altered by any subsequent agreement (A. 22-23), provides in full:

> "This Agreement and the agency hereby constituted shall be construed and have effect according to the Laws of England and any dispute or difference arising between the parties hereunder or regarding anything done or omitted by either party in relation to this Agreement shall be determined in accordance with these laws and in any such dispute the Agent will submit to the Supreme Court of Judicature in England as the sole competent Tribunal for determining the same." (A. 27)

Defendant, a corporation organized and existing under the laws of the United Kingdom, does not have any offices or place of business outside the United Kingdom. It is not a domiciliary of the State of New York. It neither owns, uses or possesses any real property in the State of New York. It has not qualified to do business and is not "doing business" within the State of New York. It does not conduct

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* The "Contract", referred to on p. 4, supra, is comprised of these agreements.

any systematic or regular activities within the State. It does not, in person or through an agent, transact any business within the State of New York, and it does not have any assets in the United States. (A. 18-19, 20, 23)

Contrary to plaintiff's claims (Br. 4), the record demonstrates that each of the written agreements referred to in the First Cause of Action of the Complaint was negotiated in the United Kingdom and was signed by defendant in the United Kingdom. The only discussions held in the United States by representatives of defendant were very preliminary in nature. No contracts were negotiated or concluded, no orders were accepted, and indeed, no significant business of any sort was transacted. As provided in paragraph 10 of the November 28, 1967, agreement, all orders under the Contract were accepted on the basis of payment in cash in sterling in the United Kingdom. All sales were "ex works", under which terms all risks with respect to ordered goods pass to the buyer as soon as the goods leave the seller's factory, and thus, defendant did not itself bring the goods into the United States. (A. 19, 20, 49-50)

The Black and White Scotties, the distribution of which is the subject of plaintiff's First Cause of Action, were manufactured at defendant's Paladin Works, Fenton factory in the United Kingdom. As already noted, plaintiff's

Contract applied only to products manufactured at the Sutherland Road factory. Plaintiff has not contested the fact that the Scotties were not manufactured at the Sutherland Road factory. Accordingly, plaintiff's alleged contract claim is disproved by the language of the very agreement under which plaintiff claims, an agreement which plaintiff, in its memorandum in the district court, characterized as being "a carefully drafted instrument". (Mem. in Opp. 10) The Scotties were manufactured for, and sold to, Buchanan, a United Kingdom corporation wholly unaffiliated with defendant, and were delivered in the United Kingdom to Buchanan, after which time defendant ceased to have any control or ownership over, or interest, in the Scotties. The contract between Buchanan and defendant was made in the United Kingdom and all negotiations on the terms of the contract took place in the United Kingdom. (A. 19, 49-50)

Plaintiff claims that it had been distributing Royal Adderley products for three years prior to, in 1970, discovering advertisements indicating that the Scotties bore the Royal Adderley backstamp, and alludes to unspecified reactions it had upon discovering this. (Br. 4-5) It is clear from the record, however, that plaintiff did not become defendant's distributor until 1971. (A. 30) Plain-

tiff accordingly knew of the sale of Royal Adderley Scotties at the time it first became defendant's distributor. The record is barren of any evidence that plaintiff, or its assignor, made any claim with respect to the Scotties' sale at that time or any other until after defendant legally terminated plaintiff's distribution contract.

Defendant's agreement with respect to the products designed by Nan Prussack, the sale of which is the subject of plaintiff's Second Cause of Action, was also negotiated in the United Kingdom. The products were designed and manufactured in the United Kingdom, and were sold and distributed solely outside the United States. (A. 19-20, 49-50; Appellant's Br. 5)

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THIS ACTION UPON THE GROUND OF THE EXISTENCE OF AN ENFORCEABLE FORUM STIPULATION.

The first ground for dismissal stated by the District Court is the "existence of an enforceable forum stipulation". (A. 52) This ruling is correct, and should be affirmed.

A. <u>The District Court Correctly Held That the Parties' Contract Contains a Forum Stipulation Applicable to</u>

Plaintiff's Claim.

Plaintiff sues for alleged breach of the distribution agreements which it had with defendant. The principal agreement, referred to in both causes of action, is the November 28, 1967, written agreement between Ridgway and Exclusive (plaintiff's assignor). Paragraph 13 of this agreement provides in full:

> "This Agreement and the agency hereby constituted shall be construed and have effect according to the Laws of England and any dispute or difference arising between the parties hereunder or regarding anything done or omitted by either party in relation to this Agreement shall be determined in accordance with these laws and in any such dispute the Agent will submit to the Supreme Court of Judicature in England as the sole competent Tribunal for determining the same." (A. 27)

Plaintiff states in its brief that it does not question that it is bound by this provision. (Br. 10) The District Court correctly held that under this provision plaintiff's claim may only be brought in England.

Plaintiff's brief imaginatively attempts to portray this paragraph as constituting merely an agreement by plaintiff that if defendant should bring an action in England, plaintiff would not object to personal jurisdiction there. This position is demonstrably unfounded.

Plaintiff's interpretation of this paragraph egregiously ignores the unequivocal penultimate language thereof. It is there provided that the agent will submit to the English

courts "as the sole competent Tribunal for determining the same". (Emphasis added.) This phrase, which is critical to the meaning of the paragraph, clearly indicates that the parties intended and agreed that England would be the only forum in which actions under the contract would be brought, not merely that the agent would appear in England if sued there. There is no other way that the paragraph in its entirety can be understood that is at all plausible.

Plaintiff's construction of Paragraph 18 is also predicated upon reading this provision as if the words "its person" appeared after "submit"--that is, as if the provision said: the Agent will submit its person to the Supreme Court of Judicature in England. Thus, plaintiff's interpretation is implicity based upon the insertion of restrictive and qualifying words as to what is to be submitted. These words do not appear in the provision, and it is unreasonable, and in violation of the manifested intention of the parties, to add them there by construction, particularly since such insertion would not be consistent with the final phrase of the provision, discussed above. There is, moreover, no reason to guess as to what the parties intended to agree to submit to the English courts, for Paragraph 18 makes this abundantly clear; what is to be submitted is "any such dispute", not merely the agent's person.

Similarly, the paragraph contains no language qualifying the forum stipulation so as to limit its applicability solely to suits by defendant. Significantly, the "such dispute[s]" to be submitted are "dispute[s] or difference[s] . . . regarding anything done or omitted by either party . . . ." (Emphasis added.) This language in Paragraph 18 clearly demonstrates that the forum stipulation is also applicable to suits against defendant alleging deficiencies in defendant's performance, including certainly its principal obligation to pay commissions when due. Plaintiff's construction would require the conclusion that what the contracting parties wished to insure was merely that defendant might itself bring suit in England if there was a "dispute . . . regarding anything . . . omitted by [defendant]". Surely the far more likely expectation was that actions for omissions by defendant would be brought by plaintiff.

We are at a loss to understand plaintiff's apparent contention that the language of Paragraph 18 is passive in nature. (Br. 10) The active nature of plaintiff's contemplated duty could not have been expressed more clearly than by the words actually used: "the agent will submit [any dispute or difference] . . . ."

Plaintiff cites a number of examples of forum stipulation provisions. (Br. 11) The language of these clauses

clearly parallels the language of the paragraph herein, and thus supports the conclusion of the Court below.

The only provision cited by plaintiff held not to be a forum stipulation is that cited in Keaty v. Freeport Indonesia, Inc., 503 F.2d 955 (5th Cir. 1974). This case is inapposite. The sole purpose of the Keaty clause was to provide at least one forum where either party could obtain jurisdiction over the other. The disputed clause in Keaty did not provide, as does Paragraph 18, that it applied to any dispute arising under the agreement, or that it applied to disputes concerning anything done or omitted by either party, or that the referenced forum was to be the sole tribunal in which any disputes might be raised. Unlike the clause in Keaty, the clause herein is not subject to two reasonable interpretations. Accordingly, it is not subject to the rule in Keaty that the preferred interpretation of an ambiguous passage is that which operates more strongly against the party from which the words proceed. See National Equipment Rental, Ltd. v. Reagin, 338 F.2d 759, 763 (2d Cir. 1964). Moreover, there is nothing in the record to support plaintiff's apparent contention that the Contract was drafted by defendant. Rather, plaintiff's own affidavit indicates that the November 28, 1967, agreement was the product of extensive negotiations between defendant and plaintiff's

assignor.* (A. 32-33) Further, the apparent facts in Keaty are wholy dissimilar from the facts herein because, in this case, plaintiff has submitted no affidavit or other evidence that it, or its assignor, ever believed or contended that Paragraph 18 was other than a forum stipulation applicable to disputes such as the instant case. It is plaintiff, rather than defendant, who seeks an ex post facto alteration of its contract, thereby hoping to obtain from the courts what its assignor neglected or failed or chose not to obtain during the contract negotiations.

The forum stipulation is thus demonstrably applicable to claims asserted by plaintiff allegedly under the Contract, such as the claims made herein.

B. The District Court Properly Held That the Forum Stipulation Should Be Enforced.

As set forth above, the principal agreement provides that English law is to govern. In determining whether such a choice of law provision shall be followed, a Federal court

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* There is no evidence that plaintiff's assignor was not also agreeable to this stipulation to an English forum, or that defendant furnished the particular language in Paragraph 18 embodying the parties' agreement on this point, or that, if requested by defendant, it was not obtained by defendant's making significant concessions on some other point. In any case, the unambiguous nature of Paragraph 18 renders all such questions, and the absence of evidence and knowledge thereon, immaterial.

exercising its diversity jurisdiction should apply the law of the state in which the Federal court sits. National Equipment Rental, Ltd. v. Reagin, 338 F.2d 759, 762 (2d Cir. 1964) (New York law applied pursuant to contract clause). Under New York law, choice of law stipulations are valid, provided that the place whose laws are chosen bears some reasonable relation to the transactions to be governed, and will be followed by the court. Heller v. National General Corp., 39 App. Div. 2d 688, 332 N.Y.S.2d 511 (1st Dep't 1972); Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969), aff'd mem. on the opinion of the App. Div., 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625 (1970). Therefore, this dispute, and in particular the validity of the forum stipulation, is to be governed by English law, pursuant to paragraph 18 of the November 28, 1967, agreement.

According to English law, forum stipulation clauses are valid and will be enforced by the courts absent a factual showing that it would not be fair and right to do so. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Plaintiff has not contested that the clause herein would be enforceable under English law. Apparently plaintiff is willing to concede this.

In the opinion in The Bremen, the Supreme Court quoted from the opinion of the English Court of Appeals in

Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Co., [1968] 2 Lloyd's Rep. 158, 162-63:

> "'The law on the subject, I think, is not open to doubt . . . . It is always open to parties to stipulate . . . that a particular Court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the 'London Court,' which I take as meaning the High Court in this country. Prima facie, it is the policy of the Court to hold parties to the bargain into which they have entered. . . .
>
> "I approach the matter, therefore, in this way, that the Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain.'" 407 U.S. at 4-5 n.4.

Judging the instant case by the test under English law, it is clear that this Court should enforce the forum stipulation clause and decline to exercise its jurisdiction over this case. Here there is no charge that plaintiff was coerced or defrauded into agreeing to the forum stipulation. Nor can it be said that plaintiff would be denied a fair hearing by an English court. See The Bremen, 407 U.S. at 12 (English courts); Allianz Versicherungs-Aktiengesellschaft Munich Reinsurance Co. v. S.S. Eskisehir, 353 F. Supp. 84, 85 (S.D.N.Y. 1972) (Turkish courts). Certainly, an English court must be deemed the most competent tribunal to determine the legal issues in this case since, as demonstrated above, these issues are to be decided in accordance with English law. See Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 195,

301 N.Y.S.2d 397, 401 (1st Dep't 1969), aff'd mem. on the opinion of the App. Div., 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625 (1970) (stipulation that any disputes would be tried in Panama under Panamanian law). Accord, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

Nor is it open to plaintiff to contend that the forum stipulation clause should not be enforced because it would allegedly be inconvenient or more expensive for it to make its case before an English tribunal. Where such inconvenience was foreseeable at the time of contracting, it affords no ground for refusing to enforce the forum clause. The Bremen, 407 U.S. at 16-18. Indeed, the "proper burden of proof" applied under English law, as enunciated by the United States Supreme Court, is:

> "[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." 407 U.S. at 18.

There is, moreover, nothing in the record to indicate any inconvenience whatsoever to plaintiff if it has to litigate in England. In fact, it might well be less expensive for plaintiff to litigate in the United Kingdom because the relevant witnesses and evidence are all located there.

Because of the presence of this choice of law stip-

ulation, this Court need not reach the issue of what law, in the absence of such a provision, would govern the enforceability of the forum stipulation in this case--Federal law,* New York law,** or "private international law".† However, it bears mentioning that the forum stipulation herein would be enforceable according to any of these.

In The Bremen, the Supreme Court of the United States held that forum stipulation clauses are presumptively

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* The suggestion appears in several cases that the principle enunciated in The Bremen is binding upon all American courts irrespective of whether state law or Federal law governs a case; these courts appear to interpret The Bremen as holding, as a prescription of American jurisprudence, that forum stipulation clauses are prima facie valid. In In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972), the court, in dictum in a state law breach of contract case, said "it would seem that the Supreme Court [in The Bremen] gave conclusive sanction to the practice of accepting such stipulations as binding in appropriate circumstances". 466 F.2d at 234 n.24. Similarly, Winston Corp. v. Continental Casualty Co., 361 F. Supp. 1023, 1031 (S.D. Onio 1973), a diversity action on a contractor's bond, cited The Bremen for the proposition that the parties could have stipulated as to law and forum, and such provision would have been binding. Likewise, in Spatz v. Nascone, 364 F. Supp. 967, 978 (W.D. Pa. 1973), involving an action on a contract providing that Pennsylvania law would govern, the court relied on The Bremen in holding valid and binding the forum stipulation clause, which provided that actions under that contract could only be brought in Pennsylvania state courts.

** See Davis v. Pro Basketball, Inc., 381 F. Supp. 1, 3 (S.D.N.Y. 1974).

† Gaskin v. Stumm Handel G.m.b.H., 75 Civ. 161 (S.D.N.Y. March 3, 1975) holds The Bremen applicable to diversity jurisdiction contract actions pursuant to this international law merchant.

valid under Federal law, which the Court found to be the same as English law on this issue. 407 U.S. at 11, et al. The Court held that such clauses should be enforced unless the party seeking to escape his contract is able to "carry its heavy burden of showing" not merely that the balance of convenience is "strongly in favor" of trial in the forum he prefers over the stipulated forum, but additionally "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court". 407 U.S. at 18-19.

As one distinguished commentator has observed, the Bremen Court's rationale for its holding is so lucid and persuasive that one may expect all courts to follow its lead irrespective of whether Federal law is technically binding on a case. Reese, The Supreme Court Supports Enforcement of Choice-of-Forum Clauses, 7 Int'l Law'r 530, 537 (1973). Accord, Becker, Forum Selection & Anglo-American Unity, 22 Int'l & Comp. L.Q. 329, 332 (1973); cases cited supra at 17 n. That rationale was in part based upon the self-interest of American businessmen. "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved . . . in our courts. . . . We cannot have trade and commerce in world markets . . . exclusively

. . . resolved in our courts." 407 U.S. at 9.

New York law similarly sustains the validity of forum stipulation clauses. In Amtorg Trading Corp. v. Camden Fibre Mills, Inc., 304 N.Y. 519, 109 N.E.2d 606 (1952), the Court affirmed a stay lodged against maintenance of a New York action with respect to a commercial contract which provided for arbitration in Russia, holding that a party to a contract could not ask a New York court to relieve it of its contractual obligation to litigate in a foreign forum. In Export Insurance Co. v. Mitsui Steamship Co., 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966), the Court held that it had the discretionary power to decline jurisdiction when presented with a forum stipulation clause, and recognized that the trend in New York law was towards upholding forum stipulation clauses with increasing frequency. In Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969), aff'd mem. on the opinion of the App. Div., 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625 (1970), the Court indicated that the burden of proof on the issue of the validity of a forum stipulation clause rested on the party opposing enforcement of the clause, and noted that the presence of a choice of law stipulation specifying that disputes be governed by the law of the stipulated forum points strongly towards honoring the forum stipulation clause. The

court indicated that New York and Federal law were the same in an alternative holding that the same decision could be reached by applying standards comparable to those of the Federal courts. Similarly, in Martin v. Mieth, 42 App. Div. 2d 892, 347 N.Y.S.2d 590 (1st Dep't 1973), rev'd on other grounds, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 (1974), the Appellate Division said that a court applying New York law does not abuse its discretion in dismissing an action where the parties have contracted that the action will be litigated in a foreign forum under that foreign forum's law.

Two recent diversity jurisdiction cases decided by the United States District Court for the Southern District of New York have recognized and continued this pattern of decision with respect to New York law. In Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (1974) (MacMahon, J.), an action for breach of contract, the Court held that the recent New York cases have left the question of forum stipulation enforcement up to the court's sound discretion and, as plaintiff concedes (Br. 18), thus found that New York law conforms to the modern trend of forum stipulation enforcement in American decisions, typified by The Bremen. Similarly, in Gaskin v. Stumm Handel GmbH, 75 Civ. 161 (March 3, 1975) (Cannella, J.), also a contract action, the Court said that

New York law and practice now conforms to the rule of presumptive validity laid down in The Bremen. In Gaskin, the court ruled against a New York plaintiff in favor of the German defendant therein, who had invoked a forum stipulation providing for a German forum. The decision relied upon the principle, said to be one of "private international law", that a forum stipulation should be enforced unless the party resisting enforcement satisfies the heavy burden of demonstrating the presence of certain extenuating factors such as the unavailability of appropriate remedies in the foreign forum or the absence of arm's length negotiation by experienced businessmen.

None of the specified factors are present in the facts of this case, nor has plaintiff ever contended that such extenuating circumstances exist that would justify excusing plaintiff from its contract. On the contrary, the facts herein are such that injustice would result if the forum stipulation were not enforced. The contract in suit was the product of negotiations between businessmen. (A. 19, 20, 32-33) Plaintiff is not an insubstantial, inexperienced local operation entitled to the special protections one might afford a poor and ignorant consumer. Plaintiff is a Delaware corporation allegedly having its principal place of business in New York (A. 3; Appellant's Br. 3), and also an office in

Amesbury, Massachusetts. It distributes various lines of imported china and silver. (Appellant's Br. 3) According to 2 Moody's Industrial Manual 2368 (1974), it is a subsidiary of Towle Manufacturing Co., a company incorporated in Massachusetts in 1880, which manufactures china, silver, crystal and cutlery. Towle's plants are located in Massachusetts, Maryland and Connecticut, and its consolidated 1973 balance sheet indicates assets of approximately $20,000,000. Plaintiff's assignor was also an experienced concern, which had been engaged in the import trade prior to negotiating the November 28, 1967, agreement with Defendant. (Appellant's Br. 3)

Plaintiff seeks to obtain commissions for sales of Scotties contracted for and consummated within the United Kingdom between citizens of the United Kingdom (A. 19, 50), in which sales plaintiff did not participate. (A. 49) The goods sold were not manufactured at the only Ridgway factory to which plaintiff's commission agreement extended. (A. 19) The Nan Prussack products were also sold outside the United States by Ridgway. (Appellant's Br. 5) Defendant is not now doing business, nor has it ever transacted business in connection with the products in suit, within the State of New York. (A. 18-20, 23, 49-50) Neither plaintiff, nor its assignor, ever had any dealings in connection with these Scotties in New York or elsewhere. (A. 19, 49-50)

The critical witnesses and proofs on the facts actually in issue are, as set forth infra at 25-26, primarily to be found in the United Kingdom. The amount for which plaintiff sues (approximately $80,000) is sufficiently great to make suit in England economically feasible. English law is to govern the dispute. (A. 27)

Thus, plaintiff seeks what can only be viewed as a windfall, and the facts are not such as might justify not requiring plaintiff to live up to its contract by suing, if it truly believes it has a meritorious claim, in England. Defendant is amenable to suit in England. Affirmance of the District Court's decision will in no way deprive plaintiff of its day in court. Rather, it will merely require plaintiff to abide by its promise to litigate any dispute it might have before an English court.

In sum, forum stipulation clauses that are freely entered into are valid and binding absent proof that enforcement of the clause would result in such grave difficulty and inconvenience that a party would for all practical purposes be deprived of his day in court. This principle is the rule under British, Federal, International and New York state law. Application of this standard to this case demonstrates that the District Court holding that a forum stipulation dismissal was in order, was proper and clearly within the Court's discretion, if not, indeed, compelled by the dictates of fairness.

POINT II

THE DISTRICT COURT PROPERLY DISMISSED THIS ACTION UPON THE FURTHER GROUND OF FORUM NON CONVENIENS.

The second ground for dismissal stated by the District Court is the "further ground of forum non conveniens". (A. 52) It was clearly appropriate for the District Court, as a matter of informed discretion, to conclude that, in the interest of substantial justice, this action should be heard in a more appropriate forum.

Rather than address itself to arguing the significance of the facts presented in the record of this case, plaintiff has resorted to cavalier assertions that the record contains no facts whatsoever relevant to whether a forum non conveniens dismissal is justified (Br. 1, 5, 6, 7, 9), ignoring the many factors appearing in the affidavits. Contrary to plaintiff's assertions he record demonstrates the presence, in this case, of many factors that the cases discussed below indicate are entitled to significant consideration in determining the forum non conveniens issue:

(1) the presence of the forum stipulation clause (A. 27), which, even under plaintiff's interpretation, demonstrates that plaintiff agreed that English courts would be an acceptable forum;

(2) the fact that English law is to govern (A. 27), so that if trial is in England, it will be held before the courts most knowledgeable on whatever legal nuances might apply;

(3) the overwhelming nexus of the parties' agreements and transations with the United Kingdom (A. 18-23, 49-50);

(4) the fact that plaintiff's causes of action arose, if at all, in the United Kingdom from Ridgway's there entering into sales agreements with third parties and thereafter not sending off commissions and royalties to plaintiff (A. 19-20, 50);

(5) the fact that most of the documents and records relevant to this action, and most of the persons with knowledge of the facts, are located within the United Kingdom (A. 18-20, 49-50), and it would therefore be substantially more inconvenient and expensive for both parties if the merits are litigated in New York; and

(6) the fact that Buchanan, the company to whom the Scotties were sold, and the parties to whom the Prussack products were sold, are probably not subject to compulsory process in the Southern District of New York (A. 19-20, 50), so that if this case is tried here, critical testimony may

be unavailable.

The facts to be determined in deciding the merits of plaintiff's claims do not involve matters that occurred in New York or were done by plaintiff or its assignor. The relevant proofs instead involve the circumstances surrounding the manufacture and sale in the United Kingdom of the goods in suit; for example, the factory at which the Scotties were manufactured, the purchasers and amounts on sales, and the reasons for affixing a particular back-stamp to the Scotties. Moreover, the fact that the documents and personnel of defendant and Buchanan are both located in the United Kingdom* indicates that the costs of discovery and proof for both plaintiff and defendant in this case would be less if the action is sent to England.

Under the doctrine of forum non conveniens, a court may, in its discretion, dismiss or stay an action if the court finds that in the interest of substantial justice the action should be heard in another forum, and thus declines to

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* Paragraph 16 of plaintiff's affidavit concedes that the office of Allied English Potteries, Inc., in New York was not used to transact business with respect to the products involved in the Contract, and accordingly, that defendant's officers and agents who dealt with plaintiff with respect to the Contract operated out of defendant's United Kingdom offices. (A. 34)

accept jurisdiction as a matter of policy although technically jurisdiction is present. In order to determine whether the doctrine of forum non conveniens should be applied in a particular case, a Federal court exercising its diversity jurisdiction should apply the law of the state in which the Federal court sits. See National Equipment Rental, Ltd. v. Reagin, 338 F.2d 759, 762 (2d Cir. 1964): "The federal court sitting in a diversity case should assume no more and no less jurisdiction than a state court would if the latter were presiding over the same matter". Accord, Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945); Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974). Accordingly, New York law governs on this issue.

The New York law on forum non conveniens has been codified in CPLR 327:

> "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

Rule 327 was added to the CPLR by Proposal No. 2 of the Judicial Conference Report to the 1972 Legislature, effective September 1, 1972. The 1972 Judicial Conference Report stated:

> "The adoption of this rule would codify the recent decision of the New York Court of Appeals in Silver v. Great American Insurance Co., 29 N.Y.2d 356 (1972). . . .
>
> "Under this equitable doctrine, a court, even though it has jurisdiction, can decline to entertain the suit if it finds, upon examining all the relevant factors of private inconvenience and public interest, that the forum is seriously inconvenient for the trial of the action and that a more appropriate forum is available. . . . The proposed rule, following the Silver decision by the Court of Appeals, would include in the CPLR a liberalized doctrine which would allow the court, on the motion of a party, to dismiss an action thereunder even though one of the parties is a New York resident, thereby counteracting the grave inconvenience which would otherwise constitute an unavoidable side effect of expanded jurisdiction." 1974-75 CPLR (Bender Pamphlet Ed.) at 3-25.

Silver v. Great American Insurance Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), involved an action by a Hawaiian physician against a New York corporation that was doing business in all states. The principal nexus was in Hawaii, although some events allegedly occurred in New York. The Court of Appeals renounced the previous New York rule providing that a forum non conveniens dismissal was unavailable in cases where one party was a resident. The court held that application of the doctrine of forum non conveniens

> "should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. Although such residence is, of course, an important factor to be considered, forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. . . ."

> "It has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary. . . . The fact that litigants may more easily gain access to our courts--with the consequent increase in litigation--stemming from enactment of the long arm statute (CPLR 302), changing choice of law rules . . . and decisions such as Seider v. Roth . . . requires a greater degree of forebearance in accepting suits which have but minimal contact with New York." 29 N.Y.2d at 361-362, 278 N.E. 2d at 622, 328 N.Y.S.2d at 402-03.

The Court of Appeals remanded so that the lower court could apply its discretion in determining whether the action should be dismissed for forum non conveniens.

Heller v. National General Corp., 39 App. Div. 2d 688, 332 N.Y.S.2d 511 (1st Dep't 1972), involved a suit by a New York corporation against defendant corporations that were primarily based in California, on a contract with respect to the services of a resident of the United Kingdom. Although some discussions had taken place in New York, the contract was finalized in California and signed in London, and California law was stipulated to govern. The First Department apparently placed great significance on the fact that California law was stipulated by the contract to govern disputes thereunder; quoting Silver, the court dismissed the action for forum non conveniens.

Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969); aff'd mem. on the opinion of the App. Div., 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d

625 (1970), was a tort action between nonresidents with respect to an accident which had occurred in New York. The parties had contracted that any disputes would be tried in Panama according to Panamanian law. Dismissal of the action for forum non conveniens in favor of litigation in Panama was held to have been proper. The court said:

> "In determining whether forum non conveniens should apply 'important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. * * * Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.' (Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508.)" 32 App. Div. 2d at 195, 301 N.Y.S.2d at 400.

In applying this standard, the court stressed two factors present in that case also present in the instant action: the contractual stipulation that disputes would be tried in a foreign nation (Panama in Hernandez) and the contractual stipulation that disputes would be decided according to the laws of that foreign nation. With respect to the latter, the court said:

> "'Moreover, try as we may to apply the foreign law as it comes to us through the lips of the experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, our labors, moulded by our own habits

> of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.' (Conte v. Flota Mercante Del Estado, 277 F.2d 664, 667, Friendly, C. J.) . . . ." 32 App. Div. 2d at 195, 301 N.Y.S.2d at 401.

Within the past year the courts have clarified further the liberalized New York law of forum non conveniens, emphasizing in particular the significance to the dismissal determination of there being out of state witnesses and evidence. In Martin v. Mieth, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 (1974), the highest New York tribunal, reversing the lower New York courts, held that a forum non conveniens dismissal was available in favor of another country's courts even though the cause of action arose in New York, and was required as a matter of law where the witnesses were in the foreign forum. Similarly, in Sutton v. Garcia,

Misc. 2d , 363 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1974), the Court held that it was unnecessary to determine whether the cause of action arose in New York in the course of dismissing in favor of the Columbian courts because the facts and proofs were in Columbia--in particular, because a nonparty who might be an indispensable witness and who was not subject to the compulsory process of a New York court resided there. Since New York law requires that a case be dismissed if the significant witnesses and evidence are outside the state even though the cause of action might have

arisen in New York, then surely dismissal is required in cases where, as here, the significant proofs are outside the state and the cause of action also arose outside the state. Thus, in Pertusi v. Lanza, App. Div. 2d , 361 N.Y.S. 2d 658 (1st Dep't 1974), the First Department reversed the trial court decision, holding that a forum non conveniens dismissal should have been granted where the witnesses resided outside New York and the cause of action arose outside New York even though one of the two plaintiffs was a New York resident.

Plaintiff has cited several cases on the propriety of forum non conveniens dismissals; however, none are directly relevant to the issues in this case except Silver, supra, a case favorable to the defendant, which plaintiff refers to only in passing. (Br. 5, 8) Plaintiff fails to even mention the governing statute, CPLR 327 (effective September 1, 1972), and all of plaintiff's cases predate this liberalizing statute except Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972), a Federal securities laws case, in which the forum non conveniens decision was accordingly not based upon New York law.*

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* Plaintiff explicitly conceded that New York law governs this point in its District Court brief by titling its forum non conveniens section: "The New York Rule of Forum Non Conveniens". (Mem. in Opp. 15)

Furthermore, in so far as any of the cases cited by plaintiff are still valid decided according to (or in conformity with) New York law and applicable to this case, dismissal of this action is mandated under the standards they set. For example, in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the case to which plaintiff devotes the most discussion (Br. 1, 5-7), the Court granted a forum non conveniens dismissal, reversing the Second Circuit decision for having taken too restrictive a view of the circumstances justifying dismissal. In the very portions of the decision quoted by plaintiff, the Court held that the "doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts", and that among the "important considerations" justifying dismissal are "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." 330 U.S. at 508. The Court further stated: "There is an appropriateness, too, in having the trial . . . in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems . . . in law foreign to itself." 330 U.S. at 509. Similarly, in Vanity Fair Mills, Inc. v. T. Eaton

Co., 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956) (Appellant's Br. 9), this Court granted a forum non conveniens dismissal in a case primarily concerned with sales in Canada (although some acts had occurred in the United States). This Court concluded that the balance of convenience was sufficiently in favor of litigation in Canada to justify dismissal, particularly in light of the fact that Canadian law was to be applied on the merits. 234 F.2d at 646.

Defendant submits that it has satisfied its burden with respect to demonstrating the need for dismissal of this action for forum non conveniens. Under the facts of this case, the District Court was not only within its discretion in dismissing this action, it was compelled to do so.

CONCLUSION

The District Court's dismissal was correct in all respects, and should be affirmed with costs.

April 30, 1975.

Respectfully submitted,

CRAVATH, SWAINE & MOORE
Attorneys for Defendant-Appellee,
One Chase Manhattan Plaza,
New York, N. Y. 10005

JOHN R. HUPPER,
W. FILLMORE WOOD, JR.,

Of Counsel.

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By: Barbara G. Kaplan
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